

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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	:
ARTHUR NIGRO,	:
Petitioner,	:
-v.-	: 11 Civ. 5150
UNITED STATES OF AMERICA,	:
	:
Respondent.	:
-----	x

MEMORANDUM OF LAW OF THE UNITED STATES OF AMERICA
IN OPPOSITION TO ARTHUR NIGRO'S
PETITION PURSUANT TO 28 U.S.C. § 2255

PREET BHARARA
United States Attorney
Southern District of New York
Attorney for the United States
of America

MIRIAM E. ROCAH
JONATHAN KOLODNER
Assistant United States Attorneys

- Of Counsel -

PRELIMINARY STATEMENT

The Government respectfully submits this memorandum of law in opposition to Arthur Nigro's motion to vacate, set aside or correct his sentence pursuant to Title 28, United States Code, Section 2255 (the "Motion").¹ In his Motion, Petitioner alleges ineffective assistance on the part of his counsel, Louis Cherico, Esq. In addition, Nigro claims that his untimeliness for his petition should be excused because of "newly discovered evidence." (Br. at 20). For the reasons that follow, Nigro's claims should be rejected by the Court as untimely and meritless.

BACKGROUND

A. Nigro's Conviction and Sentence

1. Indictment

At the time of Nigro's plea, he was charged in S20 08 Cr. 06 with racketeering in violation of Title 18, United States Code, Section 1962 and specifically, with the predicate acts of extortion and participation in a loansharking scheme.

2. Nigro's Guilty Plea

Nigro pleaded guilty on May 18, 2007, pursuant to a plea agreement, to a one-count superseding information (the "Information") which charged him with extortion, in violation of

¹ For citation purposes, "Br." refers to the brief accompanying the Motion. Nigro's Motion was initially filed in June 2011, pursuant to Fed. R. Crim P. 60. At the Court's suggestion, Nigro refiled the Motion on July 11, 2011 in its current form.

Title 18, United States Code, Section 1951. The Information charged that, in or about November 2001 up to and including in or about December 2002, Nigro and others "used threats of violence and economic harm in an attempt to force Victim-1 to rent a particular commercial property to Nigro and others at a below market price." The plea agreement, provided that "the parties agree that the defendant's Guidelines sentencing range is 51 to 63 months, Zone D (the 'Stipulated Guidelines Sentence')." (5/17/2007 Plea Agreement ("Plea Agr.") at 2-3). The parties further agreed that "neither a downward nor an upward adjustment or departure from the Stipulated Guidelines Range set forth above is warranted." (Plea Agr. at 3). The plea agreement further provided an explicit waiver of Nigro's appellate rights and Section 2255 rights should he receive a sentence of 51 to 63 months: "It is further agreed (i) that the defendant will not file a direct appeal from, nor litigate under Title 28, United States Code, Section 2255 and/or Section 2241, any sentence within or below the Stipulated Guidelines Range set forth above (51 to 63 months)." (Plea Agr. at 4).

At Nigro's plea proceeding on May 18, 2007, Magistrate Judge Henry B. Pitman asked Nigro whether he had reviewed his plea agreement with his attorney before signing it and Nigro responded that he had. (Tr. at 4). Judge Pitman also explained in detail the constitutional rights Nigro would be waiving upon entering a guilty plea. (Tr. at 15-17). Nigro stated he was pleading guilty because he was in fact guilty. (Tr. at 17). Nigro also

explained his crimes to the Court in his own words, stating that from November 2001 through December 2002,

accompanied by an implied threat of bodily injury, I asked the owner of a commercial realty property to rent that property to another person known to me at a rate below what the owner was asking, believing that he would acquiesce due to the implied threat of force from someone who was with me and who was an acquaintance of mine.

(Tr. at 17). Nigro also stated under oath that he was satisfied with Cherico's representation of him. (Tr. at 9).

Based on Nigro's physical appearance, his demeanor, and his answers to the questions, Judge Pitman found that Nigro was "fully competent and capable of entering an informed and voluntary plea, that he [was] aware of the nature of the charge and the consequences of the plea, that the plea is knowing and voluntary, supported by an independent basis in fact as to each of the essential elements of the offense." (Tr. at 19). Judge Pitman therefore recommended that Your Honor accept the plea, which Your Honor subsequently did.

3. Sentencing

On September 28, 2007, Your Honor sentenced Nigro principally to a term of 51 months' imprisonment. No appeal was filed.

B. The Investigation and Charges Against Cherico

Indictment 08 Cr. 786 (CM) (the "Cherico Indictment") was filed on or about August 20, 2008. On February 16, 2010, the Cherico Indictment was unsealed and case was assigned to the

Honorable Colleen McMahon. On or about February 17, 2010, Cherico was arrested by the Federal Bureau of Investigation ("FBI"). Trial against Cherico is scheduled to commence on October 11, 2011.

Cherico is charged in the Indictment with participating in a mortgage fraud scheme centered on the purchase of multi-million dollar homes in Westchester County from in or about July 2002 through in or about the end of 2002. In sum, the Cherico Indictment alleges that Cherico served as the attorney for various of the co-conspirators during the fraudulent real estate investment scheme and, in that role, negotiated and closed fraudulent purchases and sales that were part of the scheme. The Indictment also charges Cherico with conspiracy to obstruct justice, obstruction of justice and money laundering in connection with his role in using the sale of a specific property to hide the assets of a co-conspirator, Dominick Devito, in connection with Devito's sentencing on federal charges United States v. Pasquale Parello, et al., 01 Cr. 1120 (RLC).

As part of the Cherico investigation, on or about October 16, 2007, a Special Agent with the Federal Bureau of Investigation, Michael Lewis, served a subpoena for documents on Cherico at his law office in White Plains, New York, by giving the subpoena to Cherico's receptionist. (See Affidavit of Michael Lewis, attached as Ex. A).

The Cherico Indictment was the culmination of an extensive grand jury investigation into a course of fraudulent conduct by Cherico and his co-conspirators involving properties in Westchester. The investigation resulted in a series of indictments, returned between November 2006 and August 2008 charging a total of six defendants, including Cherico.² As part of the investigation of Cherico, between December 2007 and July 2008, a potential cooperating witness (the "CW"), who was close friends with Cherico, recorded several phone conversations and in-person meetings with Cherico. During those conversations, Cherico made admissions about his participation in DeVito's mortgage fraud scheme. See United States v. Cherico, 769 F. Supp. 2d 560, 564-65 (S.D.N.Y. 2011).

The same day the Cherico Indictment was returned, the Government submitted a four-page sealed ex parte letter to United States Magistrate Judge Michael H. Dolinger ("Sealing Letter") seeking to keep the Cherico Indictment under seal because of safety concerns relating to the CW who was still active in another, unrelated, investigation regarding the murder of a Genovese Crime Family Capo in 2003 in Springfield, Massachusetts. That investigation (the "Springfield murder investigation")

² The other defendants, charged in 06 Cr. 1089 (BSJ), were Louis Cordasco, Jr., John Liscio, Robert Didonato, Dominick Devito, and Daniel Forbes. Forbes died in 2009. All other defendants pleaded guilty.

centered on Nigro and several other Genovese members and associates. Magistrate Judge Dolinger so ordered the Sealing Letter the same day, thereby sealing the Indictment. Between in or about 2007 and January 2010, the CW provided information and cooperated actively with the Government, in the Springfield murder investigation by, among other things, (1) making consensual recordings related to the Springfield murder and other racketeering acts, including gambling and loansharking; (2) picking up money related to illegal gambling activity; and (3) making consensual recordings with a member of the Genovese Organized Crime Family who was incarcerated.

In or about October 2008, the CW was temporarily disabled by a medical condition and consequently reduced his level of active cooperation for several months. Under the direction of the FBI, the CW temporarily reduced his level of active cooperation while he recuperated, but did so with the express understanding that the CW would return to the CW's previous level of active cooperation once the CW's health improved. After several months, the health of the CW improved and the CW was able to return to the CW's previous level of active cooperation, including making additional recordings in the Springfield murder investigation. In or about Fall 2009, the FBI began to plan for the CW to end his active cooperation, to enter a guilty plea, and to be moved to a secure location. The decision to have the CW plead guilty was based in part on the possibility that the CW

would testify in a trial that was scheduled to begin in March 2010 in the District of Massachusetts that involved charges related to the Springfield murder.

On or about December 29, 2009, the CW pled guilty in the Southern District of New York in a sealed proceeding, pursuant to a cooperation agreement. On or about January 15, 2010, the CW was moved to a secure location.

On or about February 11, 2010, a grand jury returned a sealed, superseding indictment, S1 09 Cr. 1239 (PKC), charging Nigro, and five other defendants, with racketeering crimes including the Springfield Murder (the "Nigro Murder Indictment"). The Nigro Murder Indictment was based, in part, on information provided by the CW and evidence gathered by the CW during his active cooperation.

On February 16, 2010, the Cherico Indictment was unsealed. On or about February 17, 2010, the FBI arrested the six individuals charged in the Nigro Murder Indictment and Louis Cherico in a coordinated operation.³ In a Decision and Order dated February 24, 2011, Judge McMahon found that Judge Dolinger had properly sealed the Cherico Indictment in order to protect

³ The Nigro defendants and Cherico were arrested on the same day in order to preserve operational security for all of the planned arrests. Trial commenced against Nigro and his codefendants on March 14, 2011, and ended on April 1, 2011, when the defendants were convicted by a jury on nearly all counts and Racketeering Acts in which they were charged, including the Springfield Murder. United States v. Nigro, S5 09 Cr. 1239 (PKC).

the CW's undercover work in the Springfield Murder investigation against Nigro. See Cherico, 769 F. Supp. 2d at 568-69.

DISCUSSION

In his Motion, Nigro contends that his conviction should be vacated because, during plea negotiations and at the time of his guilty plea and sentencing, Cherico had a conflict of interest that adversely affected his representation of Nigro. Specifically, Nigro alleges that Cherico had a conflict of interest because at the time of his representation of Nigro, Cherico was being investigated by the Office of the United States Attorney for the Southern District of New York and was eventually charged by this Office with mortgage fraud, obstruction of justice and money laundering. In fact, Nigro claims that the "the acts of Cherico for which, he was arrested tangentially were associated with the indictment of the defendant," (Br. at 18), thereby creating a per se conflict. Finally, Nigro argues that the untimeliness of his petition should be excused because of "newly discovered evidence" (Br. at 20). As explained below, (1) Nigro's Motion is untimely; and (2) Nigro has not identified a per se, actual or potential conflict of interest on Cherico's part because there is no evidence that Cherico was aware of the investigation against him before October 16, 2007 (after Nigro's conviction became final), the investigation and charges against Cherico were unrelated to the charges against Nigro, and Cherico's representation of Nigro was more than satisfactory.

I. Nigro's Motion Is Time Barred.

A. Applicable Law

A motion filed under 28 U.S.C. § 2255 is timely if filed within one year of the date upon which the judgment of conviction becomes final, or within one year of "the date on which the facts supporting the claim or claims could have been discovered through the exercise of due diligence." 28 U.S.C. 2255(f)(4). Where, as here, a petitioner relies on newly discovered evidence, the statute of limitations period runs "when the facts supporting the claim or claims presented *could have been* discovered through the exercise of due diligence . . . regardless of whether petitioner actually discovers the relevant facts at a later date." Wims v. United States, 225 F.3d 186, 188 (2d Cir. 2000) (emphasis added). "A petitioner whose claim is based on newly discovered evidence has the burden of showing that he could not have discovered such evidence earlier with due diligence." Carter v. Connell, 2007 WL 1526406 *7-8 (N.D.N.Y. May 23, 2007) (citing United States v. White, 972 F.2d 16, 20 (2d Cir. 1992)).

B. Discussion

Nigro states, without any support, that his motion -- filed several years after his judgment became final in October 2007 -- should be allowed because he could not have discovered Cherico's alleged conflict sooner. (Br. at 20). Because Nigro's Motion was filed in June 2011, he would have to show that he could not have discovered, with the exercise of due diligence, the facts

underlying his motion, namely this Office's investigation of Cherico, prior to June 2010. It is clear, however, that Nigro could have discovered these facts when the Cherico Indictment was unsealed and Cherico was arrested in February 2010 -- four months earlier. Indeed, Nigro tellingly fails to state that he and his co-defendants were arrested in a coordinated takedown with Cherico in February 2010 and charged in the Springfield murder case -- thus plainly placing Nigro on notice that Cherico had been charged as well. Moreover, Nigro fails to even describe how he came to "discover" the existence of the investigation and indictment of Cherico. Clearly, given the factual record, the mere assertion by Nigro that he could not have discovered the factual predicate underlying his ineffective assistance claim earlier than one year prior to the date of his filing -- July 2010 -- fails to satisfy his burden of proving due diligence.

In short, the alleged factual predicate of Nigro's ineffective assistance claim based on a conflict of interest could have been discovered, with the exercise of due diligence, in excess of one year prior to the filing of the present motion. Accordingly, Nigro's motion is time-barred.

II. Nigro's Claim That His Conviction Should Be Vacated Or That A Hearing Should Be Ordered Because Counsel Had A Conflict Of Interest Should Be Rejected.

Nigro claims that his conviction should be reversed or that an evidentiary hearing should be ordered should be rejected

because it is clear from the record that Cherico did not have any type of conflict at the time of his representation of Nigro.

A. Applicable Law

1. Conflicts Of Interest Generally

The Sixth Amendment provides a criminal defendant with the right to the effective assistance of counsel. This right includes "the right to representation by conflict-free counsel." United States v. Schwarz, 283 F.3d 76, 90 (2d Cir. 2002). There are three types of conflicts of interest that may result in the deprivation of the effective assistance of counsel: (1) a per se conflict; (2) an actual conflict that adversely affects the attorney's representation of a defendant; and (3) a potential conflict that results in prejudice to the defendant, which is analyzed under the traditional ineffectiveness standard set out in Strickland v. Washington, 466 U.S. 668 (1984). See Armienti v. United States, 313 F.3d 807, 810 (2d Cir. 2002); United States v. John Doe No. 1, 272 F.3d 116, 125 (2d Cir. 2001); see also United States v. Peterson, 233 F. Supp. 2d 475, 489-92 (E.D.N.Y. 2002) (analyzing alleged conflict to determine whether it met any of three standards).

In the Second Circuit, per se conflicts have been found only in two classes of cases: where trial counsel "is not authorized to practice law" and where trial counsel "is implicated in the very crime for which his or her client is on trial." Armienti v.

United States, 234 F.3d 820, 823 (2d Cir. 2000); see Solina v. United States, 709 F.2d 160, 164 (2d Cir. 1983) (unlicensed attorney); United States v. Cancilla, 725 F.2d 867, 868-70 (2d Cir. 1984) (attorney implicated in client's crime). A per se conflict requires "automatic reversal without a showing of prejudice." United States v. John Doe No. 1, 272 F.3d at 125; see Armienti v. United States, 234 F.3d at 823.

The per se rule is only invoked, however, where the attorney's criminal activity is closely related to the charged crimes of the defendant. Where the attorney's criminal conduct "involves a completely different substantive crime and is factually and temporally distinct" from the client's conduct, the per se rule does not apply. United States v. Levy, 25 F.3d 146, 157 n.8 (2d Cir. 1994) (finding counsel's criminal involvement in bail jumping by client's co-defendant not sufficiently related to invoke per se rule).

By contrast, in order to prevail on a claim of an actual conflict, a defendant must first show that an actual conflict between him and his counsel existed and then must also demonstrate that the conflict adversely affected his counsel's performance. Armienti v. United States, 313 F.3d at 811. An actual conflict exists when "during the course of the representation, the attorney's and defendant's interests diverge with respect to a material legal or factual issue or to a course of action." United States v. Schwarz, 283 F.3d at 91 (applying

standard derived from Cuyler v. Sullivan, 446 U.S. 335 (1980)). To show divergent interests, "[s]peculation is not enough." Triana v. United States, 205 F.3d 36, 42 (2d Cir. 2000). Nor is a "mere theoretical division of loyalties" sufficient. Mickens v. Taylor, 535 U.S. 162, 171 (2002).

An actual conflict adversely affects an attorney's performance when a "lapse in representation" resulted from the conflict. Armienti, 313 F.3d at 811; see also Cuyler v. Sullivan, 446 U.S. 335, 336 (1980); Amiel v. United States, 209 F.3d at 199. "That is, the defendant must demonstrate that some plausible alternative defense strategy or tactic might have been pursued," but was not, "and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." Armienti, 313 F.3d at 811; see also United States v. Feyrer, 333 F.3d 110, 116 (2d Cir. 2003).

Claims of a conflict that do not fall into the categories of per se conflicts or actual conflicts are potential conflicts and are evaluated exactly as any other claim of constitutional ineffectiveness. See, e.g., Armienti v. United States, 234 F.3d at 824. The defendant seeking to show a potential conflict must satisfy the traditional standard established by Strickland v. Washington, 466 U.S. 668, 688 (1984).

2. The Strickland Test

To prevail on a claim of ineffective assistance of counsel, a defendant must: (1) demonstrate that counsel's performance fell below an "objective standard of reasonableness" under "prevailing professional norms;" and (2) "affirmatively prove prejudice" from the alleged dereliction in counsel's performance. Strickland v. Washington, 466 U.S. 668, 687-88, 693-94 (1984). Only if both of these elements are satisfied can the petitioner demonstrate that his "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." Id. at 687.

In evaluating counsel's performance, "a reviewing court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." United States v. Venturella, 391 F.3d 120, 135 (2d Cir. 2004) (internal quotation marks omitted). Judicial scrutiny of counsel's performance "must be highly deferential," Strickland v. Washington, 466 U.S. at 689, particularly when considering matters of trial strategy, which reviewing courts are "ill-suited to second-guess." Greiner v. Wells, 417 F.3d 305, 323 (2d Cir. 2005) (internal quotation marks omitted). In making judgments about the effectiveness of counsel, the Second Circuit has "declined to deem counsel ineffective notwithstanding a course of action (or inaction) that seems risky, unorthodox, or downright

ill-advised." Tippins v. Walker, 77 F.3d 682, 686 (2d Cir. 1996).

As to the second prong of the Strickland test, in order to demonstrate prejudice, a defendant must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 693-94. A defendant cannot establish prejudice by showing merely that counsel's errors had "some conceivable effect" on the result, for "not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." Id. at 693. While Strickland's prongs are often described sequentially, a reviewing court need not consider the first prong before turning to the second. "The object of an ineffectiveness claim is not to grade counsel's performance," and "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." Id. at 697.

B. Discussion

1. There Was No Conflict Between Nigro and Cherico

Nigro appears to allege all three types of conflict in his petition: per se, actual, and potential. None of these arguments has merit.

With respect to Nigro's allegation of a per se conflict, Nigro does not -- and cannot -- satisfy the requirement that the conduct for which Cherico was investigated and charged

was "closely related" to the conduct at issue in Nigro's case before Your Honor. Indeed, Nigro appears to acknowledge as much, as he only alleges that "[t]he acts of Cherico for which, he was arrested tangentially were associated with the indictment of the defendant [sic]." (Br. at 18). Even assuming this were true, of course, it would not satisfy the standard for a per se conflict. See Fulton, 5 F.3d at 611 ("[o]f course, the per se rule does not apply any time a court learns that an attorney may have committed a crime; the attorney's alleged criminal activity must be sufficiently related to the charged crimes to create a real possibility that the attorney's vigorous defense of his client will be compromised."); see also United States v. Williams, 372 F.3d 96, 104 (2d Cir. 2004) (stating that *Fulton* court held "that where it is alleged that defense counsel engaged in the same or similar crimes for which the defendant stood trial, the conflict 'so permeates the defense that no meaningful waiver can be obtained'" (quoting *Fulton*, 5 F.3d at 613)).

Moreover, Nigro's assertion that Cherico's criminal conduct was even "tangentially" related to Nigro's in this case is simply wrong. Cherico was charged with participating in a mortgage fraud scheme involving the sale of residential homes in Westchester County from July through December 2002 with five co-conspirators. Nigro's conduct, involving a completely different co-conspirator, was an on-going extortion of a victim who owned a commercial building in Harlem, New York in 2001 and 2002. Thus,

these facts do not implicate the per se rule, because Cherico's criminal conduct "involves a completely different substantive crime and is factually and temporally distinct" from the client's conduct. See Levy, 25 F.3d at 157 n.8 (2d Cir. 1994) (finding counsel's criminal involvement in bail jumping by client's co-defendant not sufficiently related to invoke per se rule).

Nigro fares no better in alleging that Cherico had an actual conflict, because there is no claim that Cherico knew about this Office's investigation of him at the time that he was representing Nigro in the case before Your Honor. Therefore, there can be no claim that Cherico's and Nigro's interests diverged. See Armienti, 313 F.3d at 813-14 (no divergence of interests where defense counsel did not believe he was under investigation at the time that he represented the defendant). Nigro presumes that Cherico knew that he was being investigated by this Office, stating that "Cherico did not want a trial which would have exerbated [sic] his criminal investigation." (Br. at 18). However, the only plausible date by which Cherico knew that he was being investigated by this Office was the date on which he was served with a subpoena by the FBI -- October 16, 2007, more than a month after Nigro's sentencing. Therefore, no conflict could have arisen during Cherico's representation of Nigro.

2. Nigro's Claim That His Trial Counsel Was Constitutionally Ineffective Lacks Merit

Nigro claims that Cherico "literally forced [him] to plea

[sic] guilty . . . [and] assured a minimal sentence" and complains that the sentencing enhancements under the plea agreement were not explained to him. (Br. at 18). Nigro's conclusory and utterly vague claim -- made in one sentence -- is frivolous. Given the nature of his assertions, of course, Nigro could have, and should have, raised this claim of ineffective assistance earlier, since these complaints are unrelated to his anThe Plea Agreement made crystal clear that Nigro agreed to be sentenced to a sentence of 51 to 63 months, and agreed not to appeal or collaterally challenge such a sentence. Nigro confirmed, under oath, that he had reviewed the plea agreement with counsel, and was satisfied with Cherico's representation of him. Furthermore, he also confirmed that he was basing his decision to plead guilty simply on the promises set forth in the written agreement, without reliance on promises or predictions from anyone at all. (Tr. at 17). Moreover, Nigro was initially indicted as a member and Acting Capo of the Genovese Organized Crime Family on racketeering charges and was charged with extortion and loansharking. Cherico successfully negotiated a favorable plea for Nigro to a stand alone extortion charge. Given this record, Nigro's conclusory and self-serving claim now that he pled guilty because of unspecified representations by Cherico that contradict everything he said under oath at the plea cannot withstand scrutiny. See Harris v. New York, 2005 WL 1925435, at *3 (S.D.N.Y. Aug. 10, 2005) ("Harris's claim cannot satisfy the

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DECLARATION OF SERVICE

MIRIAM E. ROCAH deposes and says:

1. I am an Assistant United States Attorney for the Southern District of New York.

2. On September 6, 2011, I served a copy of the foregoing Government's Memorandum of Law in Opposition to Arthur Nigro's Petition Pursuant to 28 U.S.C. § 2255 upon:

Arthur Nigro
58732-054
MCC
150 Park Row
New York, NY 10007

by causing it to be placed in one of my Office's boxes for outgoing United States mail.

I declare under penalty of perjury that the foregoing is true and correct. 28 U.S.C. § 1746.

Dated: New York, New York
September 6, 2011

/s/
MIRIAM E. ROCAH

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - X
 :
 ARTHUR NIGRO, :
 Petitioner, : Affirmation
 -v.- : 11 Civ. 5150
 UNITED STATES OF AMERICA, :
 :
 Respondent. :
 :
 - - - - - X

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

MICHAEL LEWIS pursuant to Title 28, United States Code, Section 1746,
hereby declares under penalty of perjury:

1. I am a Special Agent of the Federal Bureau of Investigation ("FBI").

Since November 2009, I have been assigned to a Counter Terrorism Squad.

Previously, for approximately five and one-half years, I was an agent on the Genovese Organized Crime Squad. Our principal responsibility was to investigate the illegal activities of LCN in the New York City area and, specifically, criminal activity involving members and associates of the Genovese Organized Crime Family of LCN.

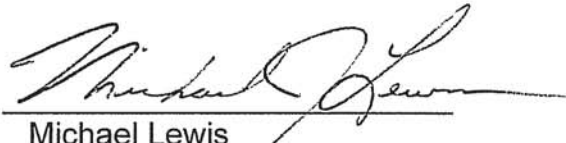
2. In October 2007, I was involved in an on-going investigation of, amongst others, Louis Cherico. As part of my involvement in that investigation, I served a subpoena for documents on Louis Cherico, Esq., at his law office in White Plains New York, by giving the subpoena to Cherico's receptionist. A copy of that

subpoena and the accompanying rider are attached as Exhibit (1) to this affirmation.

The return date on the subpoena was October 23, 2007.

3. I have reviewed my calendar from 2007, in which I recorded many of the appointments and activities in which I participated at that time. Based on that review, I know that I served the subpoena on Cherico on or about October 16, 2007.

Dated: New York, New York
August 19, 2011

A handwritten signature in black ink, appearing to read "Michael Lewis", is written over a horizontal line.

Michael Lewis
Special Agent
Federal Bureau of Investigation